MODALKU VENTURES SDN BHD v. E-TECH IT SDN BHD; ABLE ENTERPRISE (M) SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[CIVIL SUIT NO: WA-22NCC-303-06-2022]
20 SEPTEMBER 2023

Abstract – *(i) The protection afforded under s. 41 of the Sale of Goods Act 1957 ('SOGA'), in respect of acceptance of goods without inspection or examination as to their conformity to contract, extends to both the sellers and buyers. Therefore, in a circumstance where a buyer does not inspect the goods, even though ample opportunity had been accorded to the same, the buyer will not be able to rely on SOGA for protection; (ii) In regard to claims made under a factoring agreement, where the assignee initiated claims against both assignor and defendant for the purpose of recovering debts concurrently, it will not amount to a double recovery.*

CIVIL PROCEDURE: *Summary judgment – Application for – Recovery of debt under financing facility granted by financier to third party – Third party's default on financing facility resulted from defendant's non-payment of sum based on invoices issued by third party – Defendant's debt to third party assigned to financier – Factoring agreement between financier and third party that assigned debt be used to settle debt under financing facility – Whether financier fulfilled preliminary requirements for summary judgment – Whether defendant raised triable issues so as to render granting of summary judgment unjustified – Rules of Court 2012, O. 14 r. 3*

CIVIL PROCEDURE: *Pleadings – Striking out counterclaim – Counterclaim based on defence filed in application for summary judgment for recovery of debt – Whether meritous defence – Whether counterclaim frivolous, vexatious and/or abuse of court process – Whether court's tendency to strike out counterclaim intertwined to application for summary judgment that had been granted upheld by case laws*

The plaintiff was a financier that had provided the third party, Able Enterprise (M) Sdn Bhd ('Able') with a note issuance (line facility) for RM1,500,000 ('financing facility'). The said financing facility was governed by a set of security documents which included the primary agreement, note issuance (line facility) agreement *cum* guarantee dated 30 January 2019 ('transaction documents'). Further, in respect of the same financing facility, on the same date, Able had also: (i) assigned all its rights, titles and interests in the said transaction documents to the plaintiff *via* a deed of assignment of receivables ('DOA'), which encompassed the receivables under the invoices due to Able; (ii) executed a power of attorney in favour of the plaintiff which

A allowed the same to act on Able's behalf in matters related to the assigned receivables; and (iii) issued a notice of assignment ('NOA') to the defendant which instructed the same to remit future payments to an account designated by the plaintiff ('designated account'). Pursuant to the terms of the DOA, the full sum owing under the invoices was RM1,235,735,71 which ought to be
B paid to the designated account. There was also a factoring agreement entered between Able and the plaintiff in respect of the said sum. Nevertheless, between September and November 2021, a series of invoices were issued by Able to the defendant demanding for the payments to be made to the designated account. However, instead of effecting the payments, the
C defendant had, on 19 January 2022, returned the goods to Able on the basis that they were unsuitable or defective based on an existing agreement between them. These items were detailed in ten invoices dated between 27 September 2021 to 8 November 2021 ('disputed invoices'). Following this return, Able issued credit notes to the defendant on 19 January 2022 for the same amounts as the disputed invoices. Hence, as of 5 May 2022, there
D was an unpaid amount recorded at RM1,235,735.71 from the defendant. Even after a letter of demand dated 24 May 2022 was sent by the plaintiff's solicitors to the defendant, the outstanding amount of RM1,235,737.71 remained unpaid and this caused Able to default on the repayment of the financing facility. On 12 July 2022, at the Kuala Lumpur High Court, the
E plaintiff initiated an action against Able to claim for the payment of the amount of RM1,027,424.07 ('suit 328'). Other than that, separately, on 11 August 2022 and 2 September 2022, the plaintiff filed an action against the defendant in this court: (i) to pray for the outstanding sum of RM1,235.735.71 to be paid into the designated account by way of summary
F judgment under O. 14 of the Rules of Court 2012 ('ROC') ('encl. 8'); and (ii) to apply for the defendant's counterclaim to be struck out on the ground of tort of abuse of process under O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC ('encl. 12'). In resisting the action, the plaintiff raised several issues. In relation to encl. 8, the defendant claimed that there were triable issues that
G did not justify the granting of a summary judgment. The triable issues were: (i) whether the verbal agreement between the defendant and Able varied the provisions of the NOA in regard to who shall inform the plaintiff on the return of the goods ('first issue'); (ii) whether the NOA circumvented the protections afforded to the defendant by the Sale of Goods Act 1957
H ('SOGA') and was illegal for contravening the same ('second issue'); (iii) whether the defendant was entitled to an independent set-off between itself and Able in respect of the disputed invoices and the return of goods considering its verbal agreement with Able despite the NOA making provisions for trade debts, present and future rights including receivables ('third issue'); (iv) whether the present action and the plaintiff's action against
I Able in Suit 328 resulted in multiplicity of actions and against the rule of

double recovery ('fourth issue'); (v) whether future debts/future invoices assigned under the NOA were capable of being an absolute assignment pursuant to the provisions of s. 4 of the Civil Law Act 1956 ('fifth issue'); (vi) whether the defendant was legally required to return the goods to Able despite the NOA because the rights and titles to the goods had not been assigned to the plaintiff ('sixth issue'); (vii) whether the legal title of any goods sold by Able to the defendant remained with Able and any return of goods must be transacted with Able and not the plaintiff ('seventh issue'); and (viii) whether the plaintiff could make a claim payment for goods from the defendant although the same did not take possession of them and returned the same ('eighth issue'). Whereas for encl. 12, the defendant contended that it ought to be dismissed because: (i) the action by the plaintiff had a collateral purpose and an abuse of court process; (ii) there were multiple triable issues involved in the action; (iii) there were complexities in the action that necessitated a full trial; and (iv) the plaintiff failed to sufficiently demonstrate that the counterclaim was unjustified or an abuse of court process.

Held (allowing encls. 8 and 12):

(1) There was no triable issue in respect of the first issue. Clause 3 of the NOA provided that no modifications or variations to the terms of the NOA could be made without the plaintiff's written consent. Hence, the defendant's invocation of s. 92(b) of the Evidence Act 1950 ('EA') and the cases of *Lindley v. Lacey* and *Eushun Properties Sdn Bhd & Ors v. MBF Finance Bhd* ('*Eushun Properties*') were not applicable to the present action. In fact, the case of *Eushun Properties* could easily be distinguished. In the present action, there was no evidence to support that the plaintiff had agreed to a variation of the terms of the NOA regarding the return of goods and issuance of credit notes. There was also no evidence that the defendant or Able had requested for the plaintiff's written consent before making the alleged verbal agreement. The same was only known to the plaintiff when the goods were returned, and credit notes were issued without its written consent. For this reason, the defendant could not rely on s. 92(b) of the EA. (paras 22-28)

(2) The defendant could not take the position that it only agreed to execute the NOA because of the alleged verbal agreement as the plaintiff had never made any oral representations to the defendant to induce the same to sign the NOA. The alleged verbal agreement between Able and the defendant had never involved the plaintiff. Considering that: (i) the defendant had failed to provide any evidence on the alleged verbal agreement in its defence; (ii) the NOA which imposed the payment obligations on the defendant could not be superseded by the alleged verbal agreement; and (iii) the doctrine of privity of contract does not allow contractual obligations to be imposed on a non-party, the plaintiff was not bound by the terms of the alleged verbal agreement. Due to this

reason, the defendant could not be released from its payment obligations under the NOA. Other than that, as the defendant had admitted and acknowledged the invoices were issued by Able, any objections to the invoices should have come from the defendant. (paras 29-31)

(3) The second issue was not a triable issue. Although s. 41 of the SOGA establishes that a buyer is not considered to have accepted goods it has not previously examined unless he had a reasonable opportunity to inspect them for conformity with the contract, it also protects both buyers and sellers from disputes arising after acceptance of goods without examination. Therefore, if the buyer does not take the opportunity to inspect the goods and later raises issues or claims that those items do not conform to the contract, his claims may be less valid. Buyers cannot challenge the quality or conformity of goods if they had the chance to inspect them but did not exercise that right. As such, the defendant could not rely on SOGA as it had already confirmed that the goods received were in good condition by acknowledging and signing on the delivery orders dated between 27 September 2021 to 15 November 2021 ('delivery orders'). In fact, on each of the delivery orders, a representative of the defendant had affixed a stamp and signature above the statement 'Goods received in good condition'. Hence, the defendant could not claim that the goods were returned and avoid its repayment obligations to the plaintiff. (paras 36-38)

(4) The reason given by the defendant regarding the delay in inspecting and returning the goods was not accepted. The defendant's explanation for the delay, which only took place after the delivery orders were signed, was based on the Movement Control Order ('MCO') which allegedly caused the testing of the goods to commence only in early December 2021. However, the MCO ended and was replaced by the National Recovery Plan ('NRP') in June 2021 and all economic sectors were reopened in October 2021. The earliest disputed invoice was issued on 13 September 2021 while the latest disputed invoice was issued on 15 November 2021. The return of the goods did not take place until 17 January 2022 despite the MCO had ended and was replaced by the NRP as early as June 2021. (para 40)

(5) The defendant's defence of equitable set-off was not accepted and there was no triable issue in respect of the third issue. For an equitable set-off to apply, the counterclaim must be closely connected with the same transaction as the claim. The mere fact that both claim and counterclaim arose from a single trading relationship was insufficient. In the present action, the defendant had not proven that the counterclaim was closely connected in the same transaction to the plaintiff's claim, *ie*, disputed invoices. Nevertheless, the defendant's argument for the defence of equitable set-off was mainly based on the return of goods and

the issuance of credit notes. However, the defendant's counterclaim, which was based on the tort of abuse of process, did not relate to the plaintiff's claim and did not meet the test for equitable set-off. Even if the return of goods and issuance of credit notes were to be considered as part of the defendant's counterclaim, they were not closely connected to the plaintiff's claim in the same transaction as defendant had kept the goods for a long time without a reasonable explanation. (paras 43 & 44)

(6) As per the case of *Modalku Ventures Sdn Bhd v. Besi Gaya (Klang) Sdn Bhd*, it was held by the High Court that in respect of a factoring agreement, the plaintiff possessed the right to institute and maintain a claim against the assignor and the defendant concurrently until the debt was fully satisfied. There was no question of double recovery if the plaintiff was able to recover the debt from the defendant as, if the financing facility was fully settled by the assignor, the plaintiff could not recover the same from the defendant. In the present action, the defendant had not disputed the validity of the DOA and NOA and had admitted to being obliged to remit the debts payable under the invoices to the plaintiff. As such, the parties were bound by the DOA and NOA at all material times. As long as the debts have not been fully satisfied, the plaintiff was entitled to claim against the defendant and Able concurrently. The amount claimed against Able would be reduced accordingly if the plaintiff received the claimed amount from the defendant and *vice versa*. (paras 48 & 49)

(7) In respect of the fifth to eighth issues, these were not triable issues. Cases had firmly supported the idea that assignments – even those involving future rights – could be absolute. This was particularly evident when the drafting of the assignment instrument used the phrase 'absolutely assigns' which signified the clear intention of the parties for the assignment to be absolute, and not merely by way of charge. In the present action, the phrase 'assigned absolutely' was not foreign to the defendant as the phrase could expressly be found in the NOA that had been duly acknowledged and signed by the defendant. The assignment in this action therefore, both by the weight of its language and the backing of established case law, was clearly absolute. Hence, the defendant's submissions on these issues were without merit. (paras 54-58)

(8) As the defendant's counterclaim was based on allegations made in its defence that had been determined in encl. 8 that it does not have a meritable defence, the counterclaim ought to be struck out on the ground that it was frivolous, vexatious and/or an abuse of court process. Since the court's tendency to strike out the counterclaim was also upheld by the cited cases, encl. 12 was allowed. (paras 70 & 71)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bank Perusahaan Kecil & Sederhana Malaysia Bhd v. Uniti Films Sdn Bhd [2011] 1 LNS 601 HC ***(refd)***

Choo Jih Seang v. Ramachandren Narianasamy [2016] 1 LNS 579 HC ***(refd)***

CIMB Islamic Bank Bhd v. Ravichantiran Ganesan [2020] 1 LNS 415 HC ***(refd)***

Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd [2000] 7 CLJ 550 HC ***(refd)***

Esso Petroleum Co Ltd v. Milton [1997] 2 All ER 593 ***(refd)***

Eushun Properties Sdn Bhd & Ors v. MBF Finance Bhd [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 SC ***(dist)***

Fujikura Federal Cables Sdn Bhd v. Luen Wah Electric Co (M) Sdn Bhd [2009] 1 LNS 492 HC ***(refd)***

Gan Seng Biang v. Priyamas Export Corporation Sdn Bhd & Anor [2011] 3 CLJ 567 HC ***(refd)***

Geldof Metaalconstructie NV v. Simon Carves Limited [2010] 4 All ER 847 ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC ***(refd)***

Kuwait Finance House (Malaysia) Bhd v. Cheong Hooi Lin & Anor [2015] 1 LNS 605 HC ***(refd)***

Lindley v. Lacey (1864) 17 CB (NS) 578 ***(refd)***

Modalku Ventures Sdn Bhd v. Besi Gaya (Klang) Sdn Bhd [2022] 1 LNS 1158 HC ***(refd)***

Nakano (M'sia) Sdn Bhd v. Oriental Wealth (M) Sdn Bhd [2002] 1 LNS 152 HC ***(refd)***

National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283 FC ***(refd)***

Ng Seng Kee v. Danaharta Urus Sdn Bhd [2008] 10 CLJ 334 HC ***(dist)***

Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd [2020] 4 CLJ 811 FC ***(refd)***

Scarf v. Jardine [1882] 7 App Cas 345 ***(refd)***

Tai May Chean v. New Way Capital Sdn Bhd & Anor And Another Appeal [2019] 9 CLJ 477 CA ***(refd)***

Tang Man Sit v. Capacious Investments Ltd [1996] AC 514 ***(refd)***

United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors [1989] 1 LNS 122 HC ***(refd)***

Voo Min En & Ors v. Leong Chung Fatt [1982] 1 LNS 47 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 4

Courts of Judicature Act 1964, s. 25(2)

Evidence Act 1950, ss. 91, 92(b)

Rules of Court 2012, O. 14 r. 3(1), O. 18 r. 19(1)(a), (b), (c), (d)

Sale of Goods Act 1957, ss. 16, 41, 62, 63

For the plaintiff - Aufa Radzi & Anson Liow; M/s Skrine

For the defendant - Ivanpal Singh Grewal; M/s Lee Ong & Partners

Reported by Syamim Ariffin

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

Introduction

[1] This judgment concerns the plaintiff's summary judgment application (encl. 8) against the defendant for recovery under a financing agreement, resulting from the defendant's non-payment of a sum based on invoices issued by the third party and subsequently assigned to the plaintiff, together with the plaintiff's striking out application (encl. 12) against the defendant in respect of the defendant's counterclaim against the plaintiff in the same suit premised on the tort of abuse of process.

[2] After hearing these applications together, I allowed both encls. 8 and 12. This judgment contains the full grounds for my decision.

Background Facts

[3] The plaintiff, a financier, provided Able Enterprise (M) Sdn Bhd ("Able"), the third party in this action, with a note issuance (line facility) for RM1,500,000 ("the financing facility"). This arrangement was governed by a set of security documents, collectively termed "the transaction documents", which included the primary agreement, note issuance (line facility) agreement *cum* guarantee dated 30 January 2019 and four supplemental letters of offer.

[4] In relation to the transaction above, Able assigned all its rights, titles, and interests in the transaction documents to the plaintiff by a deed of assignment of receivables dated 30 January 2019 ("the deed of assignment"). This assignment encompassed the receivables under the invoices due to Able. On 3 August 2021, there were revisions to certain terms of the deed of assignment *via* an email dated 3 August 2021 from the plaintiff to Able entitled 'upgrading of terms and conditions of the deed of assignment'.

[5] Additionally, Able executed a power of attorney in favour of the plaintiff on 30 January 2019. This allowed the plaintiff to act on Able's behalf in matters related to the assigned receivables. At the same time, a notice of assignment dated 30 January 2019 ("the notice of assignment") was sent by Able to the defendant, directing it to remit future payments to a designated account specified by the plaintiff ("the designated account"). This notice included a stipulation regarding a 14-day period for any invoice objections.

[6] Between September and November 2021, a series of invoices were issued by Able to the defendant. These invoices indicated that payments should be made to the designated account. As of 5 May 2022, there was an unpaid amount recorded at RM1,235,735.71 from the defendant.

[7] On 19 January 2022, the defendant returned goods to Able on the basis that they were unsuitable or defective based on an existing agreement between them. The items returned are detailed in ten invoices dated between 27 September 2021 to 8 November 2021 ("the disputed invoices"). Following this return, Able issued credit notes to the defendant on the same day for the same amounts as the disputed invoices.

[8] Separately, there was a default by Able concerning the financing facility. In response, the plaintiff sought payment of RM1,027,424.07. Subsequent to this, legal action was initiated by the plaintiff against Able on 12 July 2022 in Suit No. WA-22NCC-328-07-2022 at the Kuala Lumpur High Court ("Suit 328") for the amount owing under the financing facility.

[9] Pursuant to the terms of the deed of assignment, the full sums owing under the invoices of RM1,235,735.71 should be paid to the designated account. After accounting for amounts owing to the plaintiff under the financing facility, any remaining funds would be directed to Able. Following a demand letter by the plaintiff's solicitors to the defendant dated 24 May 2022, the outstanding amount of the outstanding amount of RM1,235,735.71 as at 5 May 2022 pursuant to the unpaid invoices from the defendant remained unpaid.

[10] The plaintiff then filed this action against the defendant on 13 October 2022, *inter alia*, praying for the sum of RM1,235,735.71 as at 5 May 2022 to be paid into the designated account. On 11 August 2022, the plaintiff filed an application in encl. 8 under O. 14 of the Rules of Court 2012 ("ROC 2012") praying for the same. On 2 September 2022, the plaintiff filed an application in encl. 12 applying to strike out the defendant's counterclaim under O. 18 r. 19(1)(a), (b), (c) or (d) of the ROC 2012.

Enclosure 8

Law On Summary Judgment (Order 14 Of The ROC 2012)

[11] It is trite that once an application under O. 14 of the ROC 2012 is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a "*bona fide* triable issue", in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[12] Order 14 r. 3 of the ROC 2012 provides that unless the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that:

(i) there is an issue or question in dispute which ought to be tried; or

(ii) there ought for some other reason to be a trial of that claim or part,

the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

[13] It is useful to refer once again to the often-quoted decision of the former Federal Court in *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 CLJ 220; [1984] 1 CLJ (Rep) 283; [1984] 2 MLJ 300 which ruled as follows:

> We think it appropriate to remind ourselves once again that in every application under Order 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under Order 14. For the purposes of an application under Order 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of Rule 2 of the Order 14.
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> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a *prima facie* case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the Court why judgment should not be given against him.

[14] The plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendant. Thus, the burden is now firmly on the defendant to show that there is a triable issue that does not justify summary judgment to be entered against it. If the defendants can demonstrate even one triable issue, this court will not grant summary judgment. But it has to be a genuinely triable issue as it would require a trial in order to determine it (see *Voo Min En & Ors v. Leong Chung Fatt* [1982] 1 LNS 47; [1982] 2 MLJ 241).

Issues

[15] There are a number of triable issues put forward by the defendant in this matter listed as follows:

(i) whether the agreement between the defendant and Able varies the provisions of the notice of assignment regarding who shall inform the plaintiff of the return of goods;

(ii) whether the notice of assignment circumvents the protections afforded to the defendant by the Sale of Goods Act 1957 ("SOGA") and is illegal for contravening SOGA;

A (iii) whether the defendant is entitled to an independent set-off between the defendant and Able in respect of the disputed invoices and the return of goods considering the defendant's agreement with Able despite the notice of assignment making provisions for trade debts, present and future rights including receivables;

B (iv) whether the plaintiff's claim against the defendant and the plaintiff's claim against Able in Suit 328 result in a multiplicity of actions and against the rule of double recovery;

(v) whether future debts/future invoices such as those assigned under the notice of assignment are capable of being an absolute assignment C within the provisions of s. 4 of the Civil Law Act 1956;

(vi) whether the defendant is legally required to return any goods to Able, despite the notice of assignment, because the rights and titles to the goods have not been assigned to the plaintiff;

D (vii) whether the legal title of any goods sold by Able to the defendant remains with the former and any return of goods must be transacted with Able and not the plaintiff; and

(viii) whether the plaintiff can make a claim payment for goods from the defendant although the defendant did not take possession of and return E the same goods.

Analysis And Findings Of The Court

Defendant's Agreement With Able

F **[16]** The defendant submitted that it has an agreement with Able, the assignor under the notice of assignment, that can only be proven by *viva voce* evidence which the plaintiff has put the defendant to strict proof in respect of the return of goods pursuant to the agreement.

[17] According to the defendant, before entering into the notice of G assignment in January 2019, Able and the defendant agreed verbally that all payments related to the notice of assignment would go to the plaintiff until the factoring arrangement ended. It is also contended that the defendant and Able also agreed on procedures for returned goods and corresponding credit notes. The defendant maintains that it subsequently made payments H exceeding RM12,000,000 to the plaintiff based on the notice of assignment and the agreement with Able and in January 2022, the defendant returned goods worth around RM1.2 million to Able due to defects and received credit notes and never enjoyed the benefit of the returned goods.

[18] The defendant argued that it has a verbal agreement with Able I regarding the notice of assignment, which the plaintiff demands to be strictly proven concerning the returned goods.

[19] In furtherance to the verbal agreement with Able, the defendant contended and submitted as follows: A

(i) the agreement is important and admissible as evidence because it fills the gap in the notice of assignment which is silent on who is to inform the plaintiff of any objections to invoices;

B

(ii) the agreement is also relevant as the defendant only executed the notice of assignment because of the agreement and it is a fundamental part of the defendant's participation in the factoring arrangement;

(iii) oral evidence is necessary to determine the validity of the agreement with Able, and the defendant should be allowed to prove it at trial; C

(iv) pursuant to the agreement with Able, the defendant accepted the return of goods, and as a result, Able issued credit notes to the defendant for the disputed invoices; and

(v) the plaintiff's complaints about the return of goods should be directed at Able, not the defendant, as it acted in accordance with its agreement with Able. D

[20] Pertinently, the defendant raises a triable issue: "whether the agreement between the defendant and Able varies the provisions of the notice of assignment regarding who shall inform the plaintiff of the return of goods." E

[21] The court does not accept the defendant's submissions and finds that there is no triable issue relating to this point.

[22] The defendant cannot raise the verbal agreement due to the parol evidence rule as provided under ss. 91 and 92 of the Evidence Act 1950. See *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271; [2020] 4 MLJ 662 (Federal Court) where it was held that the rule preserves the genuineness and authenticity of a written document and prohibits the parties from amending the meaning of the document through oral declarations. Further, the High Court in the case of *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1989] 1 LNS 122; [1990] 1 MLJ 280 held that extrinsic evidence of an understanding is inadmissible under the parol evidence rule. F G

[23] Clause 3 of the notice of assignment states:

> Notwithstanding the assignment and charge referred to above, we remain liable to perform all obligations assumed by us in relation to the Agreement and Modalku Ventures Sdn Bhd shall not be under any obligation to perform the obligations imposed on us thereby. This notice and the instructions contained herein are irrevocable and may not be modified or varied without the written consent of Modalku Ventures Sdn Bhd. H I

[24] The defendant, therefore, cannot take the position that the defendant and Able can form an agreement to modify the terms of the notice of assignment without the plaintiff's written consent, as the notice of assignment clearly states that any modification or variation cannot be made without the plaintiff's written consent.

[25] The defendant referred to s. 92(b) of the Evidence Act 1950 for the proposition that a separate oral agreement regarding a matter not specified in a written document may be proved if it does not conflict with the written document's terms. Section 92(b) reads:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:
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> Provided that:
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> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

[26] The defendant also cited the case of *Lindley v. Lacey* (1864) 17 CB (NS) 578 for the proposition that in general, parties to a written contract are not prevented from proving that they have entered into an oral agreement regarding a matter not covered in the written contract.

[27] The defendant's invocation of s. 92(b) of the Evidence Act 1950 and the citation of *Lindley v. Lacey* are not applicable as the notice of assignment specifically states that no modification or variation can be made without the plaintiff's written consent.

[28] The case of *Eushun Properties Sdn Bhd & Ors v. MBF Finance Bhd* [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 was cited by the defendant for the proposition that collateral oral agreements (such as the verbal agreement between the defendant and Able) is an exception to the rule forbidding extrinsic evidence to be used to contradict, vary, add to, or subtract from the terms of an agreement in the form of a document. It is easily distinguishable from the present case as here, there is no evidence to support that the plaintiff agreed to a variation of the terms in the notice of assignment regarding the return of goods and issuance of credit notes. There is also no evidence that the defendant or Able requested the plaintiff's written consent before making the alleged verbal agreement. The verbal agreement was unknown to the plaintiff until the goods were returned and credit notes were issued without its written consent. Therefore, the defendant cannot rely on s. 92(b) of the Evidence Act 1950.

[29] The defendant cannot take the position that it only agreed to execute the notice of assignment because of its agreement with Able as the plaintiff never made any oral representations to the defendant that induced the defendant to sign the notice of assignment. Any alleged oral representations between the defendant and Able does not involve the plaintiff. If the defendant has any issues with Able, it may take action only against Able. In any event, the defendant who heavily relies on the alleged verbal agreement in its defence has failed to provide evidence of it in its affidavit.

[30] Further, the oral agreement or representation does not supersede the notice of assignment, which imposes payment obligations on the defendant. Under the doctrine of privity of contract only the original party to a contract may sue or be sued upon it. See *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550; [2000] MLJU 477 (High Court). See also *CIMB Islamic Bank Bhd v. Ravichantiran Ganesan* [2020] 1 LNS 415; [2020] MLJU 484 (High Court) which states that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. As the plaintiff is not a party to the alleged oral agreement or representation between the defendant and Able, it has no obligations under it. As the terms of the alleged oral agreement or representation cannot bind the plaintiff, the defendant is not released from its payment obligation under the notice of assignment.

[31] As the defendant admitted that the invoices were issued by Able to the defendant and acknowledged the invoices as good for payment, any objections to the invoices should have come from the defendant who received and acknowledged the invoices.

Sale Of Goods Act 1957

[32] The defendant submitted that cl. 4 of the notice of assignment which provides "Any objection to any invoices or its terms must be reported to Modalku Ventures Sdn Bhd within 14 days in writing after receipt of such invoices" is void because it is inconsistent with the express provisions of SOGA. In this respect, the plaintiff impugns the return of goods by claiming a delay in the return of the goods that is inconsistent with cl. 4 of the notice of assignment.

[33] The defendant contended and submitted as follows:

(i) SOGA offers various protections to buyers of goods, including freedom from encumbrances and charges, matching the description of goods, fitness for purpose, return within a reasonable time, right to inspect goods, and right to not return rejected goods;

(ii) the notice of assignment cannot exclude protections afforded by SOGA as it would be against public policy, unless it is explicitly stated in the contract (s. 62 of the SOGA);

A (iii) the defendant retained the right to inspect the goods and return unsatisfactory goods within a reasonable time and Able accepted the return of goods on the conditions set by the defendant;

(iv) fitness for purpose (s. 16 of the SOGA) is a question of fact and whether the goods were of reasonable fitness depends on relevant
B circumstances;

(v) reasonable time for return of goods is also a question of fact (s. 63 of the SOGA);

(vi) the defendant is obligated to return the goods to Able, but only the debt
C was assigned by Able to the plaintiff, not the title of the goods;

(vii) the defendant cannot be forced to pay for goods it has not taken possession of or returned and there is no longer any debt owed by the defendant to Able; and

D (viii) as the return of goods under SOGA raises many questions of fact, so the action must proceed to trial.

[34] In relation to this, the defendant raised the triable issue of "whether the notice of assignment circumvents the protections afforded to the defendant by SOGA and is illegal for contravening SOGA."

E **[35]** The defendant's submission is not accepted, and the defendant has failed to raise a triable issue on this point.

[36] The defendant cannot rely on SOGA in this case as the defendant confirmed that the goods received were in good condition by acknowledging
F the delivery order by signing on the delivery orders. This is apparent from delivery orders issued by Able to the defendant dated 27 September 2021, 20 September 2021, 13 September 2021, 1 October 2021, 6 October 2021, 12 October 2021, 21 October 2021, 18 October 2021, 15 November 2021 and 8 November 2021. On each of the delivery orders, a representative of
G the defendant affixed a stamp and signature above the statement "goods received in good condition." The defendant cannot claim that the goods were returned and avoid its repayment obligations to the plaintiff.

[37] Further, while s. 41 of the SOGA establishes that a buyer is not considered to have accepted goods it has not previously examined unless he
H has had a reasonable opportunity to inspect them for conformity with the contract, it also protects both buyers and sellers from disputes arising after acceptance without examination. Section 41 of the SOGA reads:

> Buyer's right of examining the goods
>
> (1) Where goods are delivered to the buyer which he has not previously
I examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

[38] Therefore, if the buyer does not take the opportunity to inspect the goods and later raises issues or claims they do not conform to the contract, his claims may be less valid. Buyers cannot later challenge the quality or conformity of goods if they had the chance to inspect them but did not exercise that right.

[39] In *Fujikura Federal Cables Sdn Bhd v. Luen Wah Electric Co (M) Sdn Bhd* [2009] 1 LNS 492; [2009] MLJU 447, the High Court observed that s. 41 of the SOGA stands as a protection for the seller as well as the buyer and is intended to arrest vexatious litigation. In this case, the court, applying s. 41 of the SOGA, noted that the buyer neither rejected the goods nor lodged timely formal complaints, and despite having the opportunity to inspect the goods and request test certificates after delivery, the buyer failed to do so.

[40] Moreover, the court does not accept the reason given by the defendant to delay in inspecting and returning the goods. The defendant's explanation for the delay in returning the goods, which only took place after the delivery orders were signed, is based on the Movement Control Order (MCO) which allegedly caused the testing of the goods to commence only in early December 2021. However, the MCO ended and was replaced by the National Recovery Plan (NRP) in June 2021 and all economic sectors were reopened in October 2021. The earliest disputed invoice was issued on 13 September 2021, and the last disputed invoice was issued on 15 November 2021. The return of goods did not take place until 17 January 2022 although the MCO ended and was replaced by the NRP as early as June 2021.

Right Of Independent Set-off

[41] The defendant submitted that it has the right of independent set-off in respect of the invoices, notwithstanding the notice of assignment. The defendant contended and submitted as follows:

(i) the impugned invoices were future debts assigned by Able to the plaintiff under the notice of assignment;

(ii) the defendant is entitled to equitable set-off based on the test set out in the case of *Geldof Metaalconstructie NV v. Simon Carves Limited* [2010] 4 All ER 847, which has two elements: a close connection between the impugned invoices and the return of goods, and the unjustness of the plaintiff paying for goods it did not take possession of; and

(iii) the defence of set-off is not closed to the defendant because the return of goods allows the defendant to set-off its debt with Able, and the set-off was recognised by Able when it issued the credit notes to the defendant.

[42] In relation to this, the triable issue raised by the defendant is "whether the defendant is entitled to an independent set-off between the defendant and Able in respect of the disputed invoices and the return of goods considering the defendant's agreement with Able despite the notice of assignment making provisions for trade debts, present and future rights including receivables."

[43] The defendant's defence of equitable set-off is not accepted and there is no triable issue raised in relation to it as the defendant has not met the requirement that the counterclaim must be closely connected to the same transaction as the plaintiff's claim. The defendant's counterclaim (regarding the return of goods and issuance of credit notes) is not closely connected to the plaintiff's claim (disputed invoices). In *Esso Petroleum Co Ltd v. Milton* [1997] 2 All ER 593, (English Court of Appeal), it was held that for equitable set-off to apply the counterclaim must be closely connected with the same transaction as the claim and the mere fact that both claim and counterclaim arise from a single trading relationship is insufficient to support an equitable set-off. Here, the defendant has not proven that the counterclaim is closely connected to the plaintiff's claim in the same transaction.

[44] The defendant's argument for the defence of equitable set-off is mainly based on the return of goods and the issuance of credit notes. However, the defendant's counterclaim, which is based on the tort of abuse of process, does not relate to the disputed invoices and does not meet the test for equitable set-off. Even if the return of goods and issuance of credit notes are considered as part of the defendant's counterclaim, they are not closely connected to the plaintiff's claim in the same transaction as the defendant kept the goods for a long time without a reasonable explanation. The defendant acknowledged the invoices and delivery order, and therefore, accepted its indebtedness to the plaintiff which it failed to pay.

Multiciplicity Of Actions

[45] The defendant submitted that the plaintiff's action and the action against Able in Suit 328 amounts to multiplicity and violate the rule against double recovery. In this regard, the defendant contended and submitted as follows:

(i) the plaintiff is seeking to recover the same debt twice, once against Able in Suit 328 and once against the defendant in this action;

(ii) the objective of damages is to put the injured party in the same financial position as it would have been without the incident;

(iii) the defendant also relies on the equitable doctrine of election, arguing that the plaintiff has made an election to recover the debt from Able and cannot now also recover from the defendant; and

(iv) the plaintiff cannot recover more than its loss and cannot simultaneously pursue multiple remedies for the same loss.

[46] In relation to this, the defendant raises the triable issue of "whether the plaintiff's claim against the defendant and the plaintiff's claim against Able in Suit 328 result in multiplicity of actions and against the rule of double recovery."

[47] The court does not accept the defendant's submissions and finds that there is no triable issue relating to this point.

[48] The defendant agreed and was aware that the agreement between the plaintiff and Able was a factoring agreement. A similar contention was raised in the case of *Modalku Ventures Sdn Bhd v. Besi Gaya (Klang) Sdn Bhd* [2022] 1 LNS 1158; [2022] MLJU 1293 where the High Court held that the plaintiff in the suit has the right to make a claim against the defendant for the same debt and sums it is claiming against the assignor as this is akin to a financier or bank taking recovery actions against the borrower and the guarantor. There, the plaintiff's claim is similar to a claim based on a factoring agreement, which involves the assignment of debt from the "client" (assignor) to the "factor" (new creditor or assignee). The plaintiff has the right to institute and maintain a claim against the assignor and the defendant concurrently until the debt is fully satisfied. Also, the court was of the view that there was no question of double recovery if the plaintiff was able to recover the same from the defendant as, if the financing facility is fully settled by the assignor then the plaintiff cannot recover the same from the defendant.

[49] Here, the defendant does not dispute the validity of the deed of assignment and notice of assignment and admits to being obliged to remit the debts payable under the invoices to the plaintiff. The parties are therefore bound by the deed of assignment and notice of assignment at all times, and as long as the debts have not been fully satisfied, the plaintiff is entitled to claim against the defendant and Able concurrently. The amount claimed against Able will be reduced accordingly if the plaintiff receives the claimed amount from the defendant and *vice versa*.

[50] The defendant cites s. 25(2) of the Courts of Judicature Act 1964 and the Court of Appeal case of *Tai May Chean v. New Way Capital Sdn Bhd & Anor And Another Appeal* [2019] 9 CLJ 477; [2020] 12 MLJ 471 for the proposition that the courts have the power to dismiss or stay proceedings where the matter in question is *res judicata*, or in situations of multiplicity where the same cause of action or issues are raised before different courts, indicating an abuse of the court's process. As the case does not fall under the

A category of multiplicity of proceedings as held in the *Besi Gaya* case, s. 25(2) of the Courts of Judicature Act 1964 and the case of *Tai May Chean* cited by the defendant do not apply.

[51] The case of *Tang Man Sit v. Capacious Investments Ltd* [1996] AC 514 was cited by the defendant for the proposition that a plaintiff cannot recover
B an amount from one or more defendants that exceeds his loss actually supports the plaintiff. It also states that part satisfaction of a judgment against one person does not prevent the plaintiff from bringing an action against another who is also liable, but it does reduce the amount recoverable in the second action.

C

[52] The defendant's assertion that the plaintiff's "election" to initially recover the debt solely from Able, before initiating this present lawsuit, lacks authoritative backing. While the defendant references the case of *Scarf v. Jardine* [1882] 7 App Cas 345, suggesting that an individual's selection between two remedies becomes conclusive once communicated in a manner
D causing the other party to believe the decision is final, this case is not directly applicable. *Scarf* pertained to a customer opting to sue the new firm, wherein a partner from the previous firm was also a member. Contrastingly, our present scenario features a factoring agreement and a debt assignment between the involved parties. This arrangement empowers the plaintiff to
E pursue concurrent actions against both the defendant and Able.

Assignment Of The Goods To The Plaintiff

[53] The defendant's position is that the plaintiff cannot make a claim payment for the goods from the defendant as future debts/invoices assigned
F under the notice of assignment are not considered an absolute assignment and the title to the goods remain, with Able. As the defendant is legally obliged to return any goods to Able as the rights and titles have not been assigned to the plaintiff, any return of goods must be transacted with Able, not the plaintiff. In this respect, the defendant raised the following triable issues:

G (i) whether future debts/future invoices such as those assigned under the notice of assignment are capable of being an absolute assignment within the provisions of s. 4 of the Civil Law Act 1956;

(ii) whether the defendant is legally required to return any goods to Able, despite the notice of assignment, because the rights and titles to the
H goods have not been assigned to the plaintiff;

(iii) whether the legal title of any goods sold by Able to the defendant remains with the former and any return of goods must be transacted with Able and not the plaintiff; and

I (iv) whether the plaintiff can make a claim payment for goods from the defendant even though the defendant did not take possession of and return the same goods.

[54] The court finds that these are not triable issues.

[55] Cases firmly support the idea that assignments – even those involving future rights – can be absolute. This is particularly evident when the drafting of the assignment instrument uses the phrasing "absolutely assigns", signifying the clear intention of the parties for the assignment to be absolute, not merely by way of charge.

[56] For instance, in the case of *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41; [1989] 2 MLJ 149, it was stated:

> The deed clearly purports, and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement.

[57] Additionally, the Federal Court, in *Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd* [2020] 4 CLJ 811; [2020] MLJU 228, has elaborated on the essence of "assignment" and the weight carried by the terms "absolutely assigns". This reinforces the notion that such wording exhibits the parties' intention to have the assignment treated as absolute, not simply as a charge.

[58] The very phrase "assigned absolutely" is not foreign to the defendant. Indeed, it is expressly found in the notice of assignment. This notice has not only been duly acknowledged but also signed off by the defendant. An excerpt of this notice reads:

> Dear Sirs,
>
> Notice of Assignment of Receivables/Trade Debts
>
> 1. We hereby notify you that we have, by an assignment of receivables entered into between ourselves and Modalku Ventures Sdn Bhd, **assigned absolutely** all our trade debts, present and future rights including Receivables listed starting from 1 October 2018 with an outstanding amount of RM1,276,902.80 as at 31 December 2018 in the Statement Of Account as attached to this Notice of Assignment ("Receivables").
>
> (emphasis added)

[59] The defendant's submissions on this point is therefore without merit. The assignment in this case, both by the weight of its language and the backing of established case law, is clearly absolute.

Third-Party Notice

[60] The defendant submitted that the filing of the third-party notice issued against Able is recognised as "some other reason" for trial as per O. 14 r. 3(1) of the ROC 2012. It is also argued that the inclusion of Able is

compelling enough to constitute "some other reason" for the trial of the action as it relates to the dispute between the parties and the acceptance of the return of goods and issuance of credit notes for the said return.

[61] The court does not accept the inclusion of Able in this case as "some other reason" to be a trial. The defendant's reason for including the third party, Able, is to prove the existence of the alleged verbal agreement, but even if it exists, it does not bind the plaintiff and supersede the notice of assignment for the reasons already stated above.

[62] The defendant cites the case of *Ng Seng Kee v. Danaharta Urus Sdn Bhd* [2008] 10 CLJ 334; [2008] MLJU 209 for the proposition that the inclusion of a third party in proceedings is recognised as "some other reason" for trial under O. 14 r. 3(1) of the ROC 2012. However, this case is not an authority for the proposition that the inclusion of a third party is "some other reason" to be a trial and is distinguishable from the instant case. In that case, the third party was included to answer the various allegations of fraud, negligence and manipulation of the plaintiff's account.

[63] The verbal agreement which is the basis of the defendant's third-party notice against Able is also irrelevant as explained above.

Conclusion

[64] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had clearly met the preliminary requirements in an O. 14 application in accordance with the principles established by *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* (*supra*) and further, applying the leading Supreme Court case of *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14. Accordingly, I held that the contentions of the defendant do not amount to triable issues or constitute any reasonable defence.

Enclosure 12

[65] In encl. 18, the plaintiff applied to strike out the defendant's counterclaim under O. 18 r. 19(1)(a), (b), (c) or (d) of the ROC 2012.

Submissions Of Parties

[66] In brief, the plaintiff submitted that the defendant breached its payment obligation under a notice of assignment from Able, with the defendant having acknowledged this assignment and even made some payments to the plaintiff. The plaintiff maintained that despite this, the defendant has recently made unfounded claims about returning goods to Able to avoid further payments, with no supportive evidence. The plaintiff argued that the defendant's counterclaim, which echoes these arguments, appears as

a mere attempt to escape debt payment. The plaintiff submitted that if the summary judgment application in encl. 8 is allowed, the counterclaim should also be dismissed for being frivolous and an abuse of process.

[67] In summary, the defendant submitted that encl. 12 should be dismissed due to several reasons. Firstly, the action by the plaintiff has a collateral purpose and is an abuse of court process. Secondly, there are multiple triable issues, including the oral understanding between parties, the validity of the debt assignment, and the rights under the Sale of Goods Act 1957, among others. Thirdly, these complexities necessitate a full trial, allowing the defendant to present evidence against the plaintiff's claims. Lastly, it argues that the plaintiff has not sufficiently demonstrated that the counterclaim is unjustified or an abuse of the court process.

Analysis And Findings Of The Court

[68] The defendant's counterclaim is premised on the tort of abuse of process. The defendant contended that the plaintiff does not have a claim against the defendant but commenced this suit against the defendant for a collateral purpose and/or is an abuse of court process relying on all that is pleaded in its defence.

[69] In essence, the defendant contended that it is entitled to return unsuitable and/or defective goods to Able and cannot be made to pay for the amount on the disputed invoices as it never enjoyed the benefits of the goods. The defendant also claims that the plaintiff had full knowledge that there was no debt outstanding and payable to the plaintiff by the defendant and that the plaintiff is attempting a double recovery by bringing a similar action against Able in Suit 328.

[70] As the defendant's counterclaim is based on the allegations made in its defence to the plaintiff's claim and the court has determined in the summary judgment application that it does not have a meritable defence, it is warranted that this counterclaim be struck out as it is frivolous, vexatious, and/or an abuse of the court process. Reinforcing this stance, several precedents can be highlighted. For instance, in *Kuwait Finance House (Malaysia) Bhd v. Cheong Hooi Lin & Anor* [2015] 1 LNS 605 (High Court), the counterclaim was struck out on identical grounds upon which summary judgment was granted. Similarly, *Choo Jih Seang v. Ramachandren Narianasamy* [2016] 1 LNS 579 (High Court) affirmed that if summary judgment favours the plaintiff, an intertwined counterclaim is consequently untenable. The High Court in *Nakano (M'sia) Sdn Bhd v. Oriental Wealth (M) Sdn Bhd* [2002] 1 LNS 152 reiterated this by holding that a counterclaim, already addressed in a summary judgment application, cannot be revived at a later stage. In another significant case, *Bank Perusahaan Kecil & Sederhana Malaysia Bhd v. Uniti Films Sdn Bhd* [2011] 1 LNS 601 (High Court), the doctrine of *res judicata* was

A applied, emphasising the binding nature of prior decisions and precluding the re-litigation of adjudged issues. Lastly, the judgment in *Gan Seng Biang v. Priyamas Export Corporation Sdn Bhd & Anor* [2011] 3 CLJ 567 (High Court) highlighted the application of *res judicata* when there was a conspicuous similarity between affidavits in two separate proceedings. These cases consistently uphold the courts' tendency to strike out counterclaims linked to already adjudged defences.

B

Conclusion

[71] Considering the totality of the facts and circumstances of the case as disclosed in the affidavit evidence, it was quite clear to me that the plaintiff had met the requirements in an O. 18 r. 19 of the ROC 2012 application in accordance with the principles established by the *locus classicus Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 (Federal Court). The defendant's counterclaim is struck out as it is frivolous, vexatious, and/or an abuse of the court process. Accordingly, I allowed encl. 12.

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